

# EXHIBIT 33

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF TENNESSEE

3 - - - - -x

4 ULTIMA SERVICES CORPORATION,

5 Plaintiff,

6 No. 2:20-cv-00041-DCLC-CRW

7 -against-

8 U.S. DEPARTMENT OF AGRICULTURE, U.S.  
9 SMALL BUSINESS ADMINISTRATION, SECRETARY  
10 OF AGRICULTURE, and ADMINISTRATOR OF THE  
11 SMALL BUSINESS ADMINISTRATION,

12 Defendants.

13 - - - - -x

14 March 7, 2022

15 10:03 a.m. (EST)

16 DEPOSITION of Dr. Jon Wainwright, the  
17 Expert Witness in the above-entitled  
18 action, held at the above time and place,  
19 taken before Garry J. Torres, a  
20 Stenographer and Notary Public of the  
21 State of New York, pursuant to the Federal  
22 Rules of Civil Procedure, Notice and  
23 stipulations between Counsel.

24 \* \* \*

1 APPEARANCES :

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13 Attorneys for Defendants  
14

15 ALSO PRESENT:

16 MICHELLE SCOTT  
17 ANDREW BRANIFF  
18 K'SHAANI SMITH  
19 JULIET GRAY

20 \* \* \*

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED, by  
and among counsel for the respective  
parties hereto, that the filing, sealing  
and certification of the within deposition  
shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED  
that all objections, except as to form of  
the question, shall be reserved to the  
time of the trial;

IT IS FURTHER STIPULATED AND AGREED  
that the within deposition may be signed  
before any Notary Public with the same  
force and effect as if signed and sworn to  
before the Court.

\* \* \*

1           A.       4109 Avenue F, Austin, Texas  
2       78751.

3           Q.       How old are you, sir?

4           A.       58.

5           Q.       And you're now retired; is that  
6       right?

7           A.       Semi-retired, yes.

8           Q.       Maybe you could describe for us  
9       what semi-retired is --

10          A.       I retired --

11          Q.       -- and how I can aspire to it?

12          A.       I retired from NERA National  
13       Economic -- NERA Economic Consulting in  
14       2018, the end of 2018, but as obvious from  
15       today I'm still doing some consulting work  
16       occasionally, but mostly retired.

17          Q.       Okay. There's a number of  
18       articles on your CV. Have any of them  
19       been published in peer review journals?

20          A.       I don't believe so. Is there  
21       any in particular you're referring to?  
22       But I don't believe so.

23          Q.       Okay. So you -- in 1995 started  
24       as a consultant at NERA; is that right?

25          A.       Yes.

1 Q. Okay. That doesn't study  
2 availability in the same kind of way that  
3 the NERA studies of government contracting  
4 did though; is that right?

5 A. I wouldn't say that's right.

6 Q. Okay. Tell me why you think the  
7 study of survey evidence is the same as  
8 the study of availability and utilization  
9 that NERA did for government entities?

10 MS. DINAN: Objection.

11 Mischaracterizes previous testimony.

12 You can answer.

13 MR. ROSMAN: Okay.

14 Q. You can try. Go ahead.

15 A. The SBO data, for example, gives  
16 you the entire universe of businesses in a  
17 given geographic or industrial division.  
18 It also identifies the number of  
19 minority-owned businesses in that -- in a  
20 given division and that is -- that's a  
21 census of businesses and the one number  
22 into the other is, in fact, an  
23 availability statistic.

24 Q. Right. But it relies on survey  
25 evidence, right?

1     you did not yourself test for statistical  
2     significance?

3                 MS. DINAN:   Objection.  
4     Foundation.

5     Q.         Okay.   Let's start again then.

6                 MR. ROSMAN:   That's fair.

7     Q.         So if we go back to page 21,  
8     which you were reading from previously,  
9     the first bullet below the first part --  
10    two lines of text refers to statistical  
11    significance testing for disparity  
12    indexes.

13                As I understand it from your  
14    testimony and from reading your report, a  
15    specific record would get coded as  
16    statistically significant only if the  
17    underlying study said it was statistically  
18    significant; is that right?

19     A.         Only if the underlying study  
20    included a test for statistical  
21    significance.

22     Q.         Right.

23     A.         So yes.

24     Q.         I think we're saying the same  
25    thing?

1           A.       I think so.

2           Q.       Okay. And do you have some  
3 estimate as to what percentage of the  
4 records that you viewed had an entry for  
5 statistical significance?

6           A.       Maybe roughly a fifth to a  
7 quarter of the total.

8           Q.       Okay. If there was a test for  
9 statistical significance and the  
10 underlying study concluded that the  
11 specific disparity number was not  
12 statistically significant, would that be  
13 coded in the record by you?

14          A.       Yes.

15          Q.       So the 20 to 25 percent number  
16 is the number where there was a test for  
17 statistical significance regardless of  
18 whether the number was statistically  
19 significant; is that correct?

20          A.       I believe that's right.

21          Q.       So of the 20 to 25 percent, do  
22 you have an estimate of how many of those  
23 or what percentage of those were  
24 statistically significant?

25          A.       I believe that's what I tried to



1           A.       I cannot as I sit here.

2           Q.       The studies had various methods  
3 of determining availability. Did you  
4 review the underlying documents that went  
5 into their availability calculations?

6           A.       For the non-NERA studies, no.

7           Q.       Did you do it for the NERA  
8 studies?

9           A.       Obviously.

10          Q.       Oh, I meant in creating this  
11 report in the last year, did you review  
12 the availability --

13          A.       No, I took them at face value.

14          Q.       All right. I'm just going to  
15 ask you a couple of questions about the  
16 custom census approach that you've  
17 identified on page 16 of your report.

18                   So the first step is to create a  
19 database of representative public  
20 contracts and when you create that  
21 database, do you actually take a sample of  
22 the contracts? Is that what the word  
23 "representative" is supposed to mean?

24          A.       Not necessarily. That would  
25 vary depending on the study in question.

1 for the city of Baltimore, we would ask  
2 firms if they had tried or attempted to  
3 try to work with the city of Baltimore in  
4 the previous five years or other public  
5 entities in the region. State of  
6 Maryland, Prince George County, the  
7 community college, what have you, the  
8 private sector.

9 Q. And would you eliminate  
10 businesses both minority and nonminority  
11 from the study if their answers were they  
12 hadn't really?

13 A. No.

14 Q. Why not?

15 A. It was just too subjective to, I  
16 guess, to make that decision, an interest  
17 in doing business can change from one year  
18 to another. Firms that are -- I  
19 just -- we did not do that. That was part  
20 of our anecdotal survey just to gauge  
21 interest in doing business.

22 But it was not something that we  
23 used to restrict the statistic partly  
24 because we had no good reason to believe  
25 that that interest or should in a race

1 neutral market be any different between  
2 the numerator and the denominator.

3 Q. Okay. Did you review how the  
4 firms other than NERA did their  
5 availability analysis?

6 A. For this report?

7 Q. Yes.

8 A. No, but I have in the past.

9 Q. Well, when you say you have in  
10 the past, how far in the past and  
11 what -- well, let's start with how far in  
12 the past?

13 A. That was a principal subject in  
14 the guidelines document that we did for  
15 the National Academy of Sciences. It's  
16 something we did in developing our own  
17 approach to measuring availability to try  
18 to take what we thought was the best and  
19 most accurate approach to it.

20 And -- you know, one of the  
21 other purposes of doing this metaanalysis  
22 was to attempt to establish is despite the  
23 fact that different consultants measure  
24 availability quite differently from the  
25 way NERA does, could we still draw any

1 market?

2 A. That's correct.

3 Q. So when NERA did it, they didn't  
4 make any adjustment in the availability  
5 statistic for the size of the business; is  
6 that right?

7 A. That's right.

8 Q. To your knowledge, did any of  
9 the underlying disparity studies that you  
10 used in your report analyze utilization  
11 only of those businesses that had been  
12 specifically certified as minority  
13 business enterprises as opposed to all  
14 minority-owned businesses?

15 A. I'm not positive about that, but  
16 it would not surprise me if there's some  
17 that used just that approach.

18 Q. Okay. And that didn't concern  
19 you that it might not have been getting  
20 all of the minority businesses in a  
21 particular market in their availability  
22 statistics?

23 A. No. Because the purpose of this  
24 report was to see what we could learn  
25 across the entire universe of disparity

1 percent in a minority category just  
2 looking at the first column, 55 percent  
3 were large adverse and statistically  
4 significant. So the other 45 percent  
5 could have been large and adverse or some  
6 of them -- a portion of them anyway but  
7 just not statistically significant.

8 Q. Got it. All right. And so for  
9 example, with Asian Americans fewer than  
10 half of the large adverse disparities were  
11 statistically significant, correct?

12 A. 47 percent.

13 Q. Okay. And just to close the  
14 loop here, there were --

15 A. It's just similarly in the final  
16 column the nonminorities is three percent.

17 Q. Yes. Right. If I can just go  
18 back to -- so table 2.2 told us that there  
19 were 4,327 overall observations in the  
20 minority category, right?

21 A. Yes.

22 Q. And table 2.7 tells us that only  
23 940 of those 4,327 had any information one  
24 way or the other about statistical  
25 significance; is that right?

1           A.       Just slightly more than a fifth,  
2       that's right.

3           Q.       Slightly more than a fifth had  
4       some information and of that 55 percent of  
5       that 1/5 of the large adverse disparities  
6       were statistically significant --

7           A.       Yes.

8           Q.       -- is that right?

9           A.       I think that's right.

10          Q.       Okay. Good. So what would you  
11       say the relevant market is in this case?

12                   MS. DINAN: Objection. Vague.

13                   MR. ROSMAN: Okay.

14          A.       Yeah, one of your earlier  
15       questions and I -- seems to be that I'm  
16       only interested in the plaintiff's market,  
17       but I think what I was asked to do was  
18       what conclusions can you draw in general  
19       across markets, across geographies from  
20       these 205 disparity studies and the other  
21       data that you looked at as -- I guess you  
22       might say as an extra added bonus, I tried  
23       to also where I could look at results  
24       similarly for those NAICS codes that  
25       appear to correspond generally to the

1     justify a preference program in a  
2     different market?

3           A.     It's never been my job to  
4     justify any preference program. That is  
5     the job for policymakers and/or the  
6     courts. All I'm trying to do is assemble  
7     the best evidence that I can to assist in  
8     those kind of determinations.

9           Q.     Okay. So I'll ask another  
10    question which I think I now know the  
11    answer to, but -- and so is it your  
12    opinion that a disparity in one racial or  
13    ethnic group can be used to justify a  
14    preference for a different racial or  
15    ethnic group?

16          A.     Yeah, I would give you the same  
17    answer.

18          Q.     Let's look at table 2.8. I  
19    think I asked before whether the NERA  
20    studies covered 11 states. That was my  
21    count. Did you -- have you of an -- now  
22    that the report is in front of you, can  
23    you verify that that's the case?

24          A.     I can try.

25          Q.     Well, I'll give you the ones

1     that I found and you can correct me, how  
2     about that. Florida was included. There  
3     were several --

4             A.     I'd prefer to --

5             Q.     Count them yourself?

6             A.     I'm sorry?

7             Q.     You want to count them yourself?

8             A.     Yeah, I said that would just  
9     make it harder.

10            Q.     Good. Good.

11            A.     Yeah, I get 11 as well.

12            Q.     Okay. Good. Let me just go  
13     through a few of those. For the state of  
14     Florida there was just one study of  
15     Broward county; is that right?

16            A.     That's right.

17            Q.     And the last year under study  
18     was 2009?

19            A.     Where did it go? For the  
20     contracting data in the study, yes.

21            Q.     Was there any other kind of  
22     data besides --

23            A.     There was census data, small  
24     business, surveys of business owners data,  
25     but the study period in that table is



1 referring to the contracting statistics  
2 that the availability and utilization  
3 statistics would have been pulled from.

4 Q. Okay. And there was only one  
5 study by NERA in Hawaii, right, the Hawaii  
6 Department of Transportation study?

7 A. Yep.

8 Q. And the last year under study  
9 for the contracting data in that study was  
10 2008?

11 A. Yes.

12 Q. And then for Minnesota there  
13 was, again, just one NERA study for the  
14 city of Minneapolis; is that right?

15 A. Yes.

16 Q. Ant last year under study for  
17 the contracting data for that study was  
18 2007?

19 A. Yep. Yes.

20 Q. And for Massachusetts -- I'm  
21 sorry, not Massachusetts, Mississippi I  
22 think we went over the Mississippi one.  
23 There was just one NERA study and that was  
24 the Jackson Municipal Airport that we  
25 talked about earlier?

1 A. You missed Massachusetts.

2 Q. I didn't miss it. I'm just not  
3 asking about it.

4 A. Oh, I see. So you're asking  
5 about Mississippi?

6 Q. Right.

7 A. And the question was?

8 Q. There's just the one study of  
9 the Jackson Municipal Airport by NERA?

10 A. Yes.

11 Q. And the last year under study  
12 for the contracting data for that study  
13 was 2010?

14 A. Yes.

15 Q. Okay. And Missouri there was  
16 just one NERA study, correct?

17 A. Yes.

18 Q. And the last year under study  
19 for the contracting data for that study  
20 was 2009?

21 A. Yes.

22 Q. And for the -- we had two  
23 studies by NERA for some part of the state  
24 of Ohio, correct?

25 A. Yes.

1 Q. And the last year under study  
2 for the contracting data for those two  
3 studies was 2008 and 2010; is that right?

4 A. Yes.

5 Q. And I skipped New York, didn't  
6 I? But NERA only had one study of the  
7 state of New York; is that right?

8 A. Yes.

9 Q. And the last year under study  
10 for that -- sorry, let me try again. The  
11 last year for the contracting data under  
12 that study was 2008, right?

13 A. Yes.

14 Q. And then finally NERA had just  
15 one study in any part of the state of  
16 Tennessee; is that right? The  
17 Memphis-Shelby County Airport Authority?

18 A. Yes.

19 Q. The last year under study for  
20 the contracting data for that study was  
21 2011?

22 A. Yes.

23 Q. Okay. All right. Good. Let's  
24 go back to table 2.8. So in table 2.8  
25 were any of these numbers assessed for

1 statistical significance?

2 A. Some of them probably were, but  
3 that's not presented in the table.

4 Q. And I take it all of the NERA  
5 studies that are included in table 2.8 at  
6 least use the same methodology for  
7 calculating disparity indexes or ratios;  
8 is that right? I'm sorry.

9 A. Is all the NERA studies?

10 Q. Sorry?

11 A. The same methodology --

12 Q. There were 21 NERA studies  
13 included in table 2.8, right?

14 A. No. I don't know if all 21  
15 studies had those particular categories  
16 but that would be the most that could be  
17 and -- but all the NERA studies use,  
18 basically, the same approach to measuring  
19 disparity.

20 Q. That's what I was asking. Thank  
21 you. So -- and just make sure I  
22 understand the numbers here. In the  
23 employment services category there was  
24 54 percent of the disparities for  
25 minorities were less than a hundred and

1 61 percent of the disparities for  
2 nonminorities males were less than a  
3 hundred; is that right?

4 A. That is correct.

5 Q. I think you've sort of answered  
6 this before but I'm going to ask it  
7 anyway, does any of the underlying studies  
8 for table 2.8 account for any other  
9 factors that may account for the  
10 disparities, like capacity?

11 A. What do you mean by "capacity"?

12 Q. The ability of a firm to do  
13 larger contracts?

14 A. Measured how? No.

15 Q. You may not have -- you may have  
16 decided not to measure it. I'm just  
17 asking whether you made any effort to do  
18 so?

19 A. I don't know that it could be  
20 measured but that is not part of our  
21 availability measure.

22 Q. Okay. All right. When you did  
23 the coding, you did do coding for  
24 nonminority, women-owned companies,  
25 correct?

1           A.       I pulled out data for everybody  
2 from the reports.

3           Q.       Right.

4           A.       So I -- yes.

5           Q.       Okay. So why didn't you include  
6 observations including nonminority,  
7 female-owned companies in tables 2.2  
8 through 2.8?

9           A.       My understanding is they're not  
10 relevant to the 8(a) program.

11          Q.       So I guess the question I want  
12 to ask as a follow up is this: When you  
13 see disparities in a group that includes  
14 women, how do you know that disparities  
15 are not caused by sex instead of race?

16          A.       Not sure I understand the  
17 question.

18          Q.       Okay. Let me see if I can think  
19 of a better way to phrase it. Let me try  
20 it this way: So when you see in table 2.2  
21 that there was a 78 percent of the  
22 disparities that you observed for Asians  
23 were less than or equal to 80 whereas only  
24 7 percent of the disparities you observed  
25 for nonminority males were less than or

1 equal to 80, how do you know that isn't  
2 caused by the fact that there's  
3 discrimination against woman-owned firms,  
4 which were included in the Asian category  
5 but not in the nonminority male category?

6 A. Because then the -- my  
7 regression analyses in the final section  
8 of the document would show coefficients  
9 that are neither large or adverse nor  
10 insignificant for minorities and the  
11 opposite for by sex and they do not. I'll  
12 leave it at that.

13 Q. That's fine, but I just  
14 want -- let's say I didn't have those  
15 other parts of your study, how would I  
16 know that the differences that we're  
17 seeing here in the numbers weren't caused  
18 by the inclusion of woman-owned firms in  
19 the Asian categories and their exclusion  
20 in the nonminority male category?

21 A. I think that's exactly how you  
22 do know is you turn to other evidence that  
23 allows you to tease out those factors.

24 Q. Okay. But this by itself  
25 wouldn't tell you that?

1           A.       Not explicitly, no.

2           Q.       Okay.   Very good.   So I just  
3   want to go back to footnote 31 and one of  
4   the things you said here in footnote 31 on  
5   page 20 is that most of the studies you  
6   viewed did not distinguish between Asian  
7   Pacific and subcontinent Asian.   And so  
8   you combined the two of them, right?

9           A.       Yes.

10          Q.       So in this part of the study we  
11   wouldn't be able to determine whether or  
12   not those disparities that you observed  
13   for Asians in general were caused by  
14   disparities as to one of those groups  
15   rather than the other?

16          A.       If you did -- if you're just  
17   applying tunnel vision to look at that one  
18   statistic, no, but again that's why I  
19   turned to other data to tease out those  
20   differences to try to answer that question  
21   to see if, in fact, it's only subcontinent  
22   Asians that are facing discrimination and  
23   Asian Pacific don't face any  
24   discrimination at all, and what you find  
25   is when you look at data that can break



1       that out is that's not the case.

2           Q.       Okay. But again just to be  
3       clear the -- this part of the study  
4       doesn't help us do that?

5           A.       No.

6           Q.       Okay. And you included Alaskan  
7       natives, Native Hawaiians and American  
8       Indians in your category called Native  
9       Americans; is that right, it is part of  
10      the study?

11          A.       No, I think it would have -- if  
12      a given disparity study had a category for  
13      Native Americans, I took that as however  
14      they defined it in that study.

15          Q.       Well, if they had a category for  
16      Native Hawaiians though, you would have  
17      included it under Native Americans; is  
18      that right?

19          A.       Well, not necessarily because  
20      depending on the government entity you're  
21      looking at Native Hawaiians as that  
22      specific example sometimes are classified  
23      in the Asian Pacific category and  
24      sometimes are classified in the Native  
25      American category.

1           Q.       Right. But what I'm asking is  
2       what you did. If you saw an underlying  
3       disparity study that had a separate  
4       category and disparity analysis for Native  
5       Hawaiians, how would you characterize it  
6       for purposes of, say, table 2.2?

7           A.       I would have to go back and  
8       check. As I sit here I couldn't tell you  
9       exactly whether that went into the Asian  
10      category or the Native American category.  
11      I'd have to check.

12          Q.       Okay. And how about the same  
13      question for Alaska natives --

14          A.       Alaska native -- I'm sorry.

15          Q.       If you saw a disparity study  
16      that had a specific disparity for Alaska  
17      natives, how would you characterize it for  
18      purposes of table 2.2?

19          A.       That would be in the Native  
20      American category.

21          Q.       Very good. So in your opinion  
22      does the data in these tables, this part  
23      of the study reflect discrimination by the  
24      government entities studied in the  
25      underling individual disparity studies?

1 Mischaracterizes his prior testimony.

2 MR. ROSMAN: I'm not trying to  
3 mischaracterize it. I'm just asking a  
4 question and putting a question mark  
5 at the end of it.

6 A. The disparities don't tell you  
7 whether the -- the disparities you're  
8 seeing are specific individual actors  
9 inside the government or outside the  
10 government causing them or larger  
11 institutional forces causing them or both  
12 or actors in the private sector, not  
13 naming names as the case may be.

14 Q. And the same would hold true  
15 about the federal government, is that  
16 right, you wouldn't be able to make any  
17 determination about whether or not the  
18 federal government was discriminating  
19 based on the analysis in part one of your  
20 report?

21 A. I don't think that's ever the  
22 purpose of any of these disparity studies,  
23 but I -- so I would say that's correct.

24 MR. ROSMAN: So this is not an  
25 actual terrible time for we here on

1 I didn't -- you know, I -- you'd really  
2 have to go to the census bureau to get a  
3 definitive answer on that.

4 Q. Let me rephrase the question.  
5 You don't know whether the census bureau  
6 does anything to check the accuracy of the  
7 response on how one capitalizes one's  
8 business; is that right?

9 A. That's not right. I'd have to  
10 refer myself to the methodology documents  
11 that are out there that detail exactly how  
12 these surveys are done and what checks  
13 there are. They do all kinds of quality  
14 control checks.

15 Whether you're trying to suggest  
16 whether somebody lies on the survey and  
17 can the census figure that out, I don't  
18 know.

19 Q. So let me just -- I had some  
20 questions about some of the tables in this  
21 part of the report. I don't think they'll  
22 take terribly long. In your footnote 47  
23 on page 39 I believe you indicated that  
24 Native Hawaiians, Asians, Pacific  
25 Islanders and subcontinent Asians are all

1 grouped together in the two surveys that  
2 are part of this -- part of your report.  
3 Did I understand that correctly?

4 A. If you said Native Hawaiians,  
5 Asians and Pacific Islanders and  
6 subcontinent Asians are grouped together  
7 as Pacific Islanders, that's correct.

8 Q. Okay. So if you can go to table  
9 3.1?

10 A. All right.

11 Q. In this table Asians are given  
12 one line and Native Hawaiians and Pacific  
13 Islanders are given another line.

14 A. Yes.

15 Q. And I'm --

16 (Whereupon, simultaneous  
17 conversation took place disrupting the  
18 record and the court reporter  
19 requested one person speak at a time  
20 without interruption from anyone  
21 else.)

22 Q. So I'm asking how you separated  
23 out Asians from Native Hawaiians and  
24 Pacific Islanders in your chart in table  
25 3.1?

1           A.       I did that because the SBO does  
2       it that way.   So I missed -- I think I  
3       misspoke earlier about that footnote, what  
4       was the footnote?

5           Q.       Well, why don't you read the  
6       footnote and tell me whether it's accurate  
7       or inaccurate?

8           A.       Native Hawaiians and Pacific  
9       Islanders are presented as a distinct  
10      category in the SBO.

11          Q.       Let me --

12          A.       Right.   Because you've got  
13      Asians -- in table 3.1 there's an Asian  
14      category and there's a Pacific Islanders  
15      category.   The Pacific Islanders category  
16      also has Native Hawaiians.

17                   So if you were to combine that  
18      into Asians and Pacific Islanders  
19      together, but they're presented in the SBO  
20      as separate line items.   So it may be the  
21      phrasing in footnote 47 was a bit  
22      inartful, but this is how it's broken out  
23      in the SBO.

24          Q.       What was inartful about footnote  
25      47?

1           A.       Well, as I read it here it seems  
2       to suggest that I got one category that's  
3       Asians and Pacific Islanders that includes  
4       Native Hawaiians, but I've actually got  
5       two line items for that in table 3.1. I  
6       have a line item for Asians and a line  
7       item for Native Hawaiians and Pacific  
8       Islanders.

9           Q.       Okay. So it's not the case as  
10      it says in footnote 47 the Native  
11      Hawaiians are grouped with Asians; is that  
12      right?

13          A.       Well, they're grouped with  
14      Pacific Islanders. What I was trying to  
15      do was differentiate it from the 8(a)  
16      categories where Native Hawaiians are  
17      included among the Native American  
18      grouping.

19          Q.       Right. I understand. I'm just  
20      trying to make sure I understand your  
21      testimony. Footnote 47 says Native  
22      Hawaiians are grouped with Asians, but I  
23      think if I understand your testimony now  
24      you're saying that that's not the case?

25          A.       Right. I think I would have

1     been more accurate to say Native Hawaiians  
2     are grouped with Pacific Islanders and  
3     Pacific Islanders are frequently grouped  
4     with Asians in a lot of other government  
5     data.

6           Q.       Well, I understand, but we're  
7     talking about the SBO right now.   Okay.  
8     So in the next sentence subcontinent  
9     Asians are grouped with Asians and Pacific  
10    Islanders, is that also incorrect at least  
11    insofar as it refers to Pacific Islanders?

12          A.       I would say the better way to  
13    state footnote 47 would be to say in the  
14    SBO and ADS Native Hawaiians are grouped  
15    with Pacific Islanders rather than with  
16    Native Americans, also subcontinent Asians  
17    are grouped with Asians rather than  
18    classified separately.

19          Q.       Okay.   So if you could just turn  
20    to page 40 of your report under A dot one,  
21    economy wide results.   There's a number of  
22    references in this part to a table three,  
23    which I could not find.   So is that an  
24    error?   So you look, for example, in the  
25    second line of the second paragraph?



1 all firms category those kinds of firms  
2 are not included?

3 A. Yeah. If I've left something  
4 out of the denominator, I leave it out the  
5 numerator too. So yes.

6 Q. Well, but if you -- before we  
7 leave the numerator/denominator topic. If  
8 we add the -- in panel B if we add those  
9 percentages, they come out to about  
10 75 percent, right?

11 A. Not added them, but  
12 that's -- it's not because of the  
13 exclusion of the firms listed in item two  
14 of the footnote.

15 Q. Okay. What is it attributable  
16 to?

17 A. I probably -- line item for  
18 women is not there.

19 Q. Okay.

20 A. Or for nonminority women.

21 Excuse me.

22 Q. Say it again?

23 A. The line item for females is not  
24 there.

25 Q. Okay. And does that, you think,

1 constitute most or all of the firms that  
2 are included in all firms but not listed  
3 in a line item?

4 A. Most but not all. They also  
5 have a category for equally male/female  
6 owned, equally minority/nonminority owned,  
7 those are pretty small bits and they're  
8 not broken out there either.

9 Q. Did you do any calculations for  
10 the equally minority/nonminority owned  
11 firms?

12 A. No, not for this table.

13 Q. Do you recall approximately what  
14 percentage of all firms they constituted?

15 A. Some -- a very small number, but  
16 I couldn't tell you exactly what.

17 Q. Was it larger than Native  
18 Hawaiians and Pacific Islanders or  
19 smaller?

20 A. I couldn't say as I sit here.

21 Q. Okay. Was it -- okay. And I  
22 assume you'd give me the same answer if I  
23 asked you whether it was larger or smaller  
24 than the American Indian and the Alaska  
25 Native category?

1 women, period, and not nonminority women.

2 Q. Okay. Well, I guess I have the  
3 same -- let me just make sure I understand  
4 it. Women-owned firms -- a firm owned by  
5 Hispanic woman would be included in the  
6 Hispanic category?

7 A. Yes.

8 Q. And so if we included the all  
9 women firm it would add up to something  
10 more than 100 percent?

11 A. I think that's right.

12 Q. So and -- well, I guess you're  
13 going to have the same question I asked  
14 before which is, how do we know from this  
15 chart that any disparities that you see  
16 are not attributable to sex?

17 A. Well, you're free to look at  
18 this chart in isolation. That's not how I  
19 did it. As an economist the document I  
20 look at as a whole. It's a good question  
21 and one I try to tackle directly in the  
22 next section.

23 Q. Okay. So the last part of the  
24 footnote says that, N-A indicates the data  
25 was not disclosed due to confidentiality

1 ability to do a job as capacity because of  
2 your capital or your number of employees  
3 or something like that. So let's call it  
4 ability to do the job and define it that  
5 way.

6 A. Well, there's a number of  
7 columns in this table that speak to that.  
8 There's -- it shows you firms -- column  
9 three is just firms with paid employees as  
10 opposed to column one, which is all firms;  
11 column five shows you the number of  
12 employees; column six shows the payroll  
13 levels. So there's all kinds of...

14 Q. Maybe I need to rephrase the  
15 question then. The disparity indices  
16 don't take that into account though,  
17 right?

18 A. The some -- vague idea of the  
19 ability to do work, no.

20 Q. Okay. Well, I mean let me give  
21 you an example. Your -- by the way before  
22 I do that, panel C says these are  
23 disparity ratios. Can you tell me why you  
24 put disparity ratios instead of disparity  
25 indices?

1           Q.       And we are still omitting about  
2   28 percent of the firms in all firms the  
3   individual line item breakouts?

4           A.       Yes.   For the same exact  
5   reasons.

6           Q.       Presumably most of them are  
7   going to be women-owned firms?

8           A.       Yes.

9           Q.       And again there's no -- there's  
10   no control for the size of the firm in  
11   this data, right?

12          A.       Yes.   The same answer for the  
13   other table.   I mean it's very similar and  
14   I think I might have an answer for your  
15   earlier question here in a minute.   Yes.  
16   That stray reference to table six should  
17   have said table 3.3.

18          Q.       Thank you.

19                   (Whereupon, a recess was taken.)

20          Q.       Dr. Wainwright, can you just  
21   explain what PUMS data is?

22          A.       Yes.   Different census sources  
23   can have PUMS data.   PUMS means public use  
24   microdata sample and so there is a PUMS  
25   sample from the SBO.   There's a PUMS

1 sample in the American community survey  
2 but it's -- the important part is the M  
3 for microdata. It's individual level data  
4 taken from a larger survey.

5 Q. This is also from the census  
6 bureau, right?

7 A. Yeah, I don't know what  
8 particular reference you're seeing but  
9 yes.

10 Q. Okay. So there were three parts  
11 to your last section of your report  
12 dealing with salary and wages, business  
13 formation and business earnings. Let's  
14 start with salary and wages.

15 How do you understand the  
16 relevance of salary and wages to  
17 contracting issues that are relevant to  
18 this case?

19 A. As -- I'm a labor economist by  
20 training and many business owners move up  
21 through the ranks in the company. So a  
22 construction contractor may have started  
23 out as a laborer and become a foreman so  
24 these are -- business ownership is an  
25 occupation within the labor market in a

1 way.

2 So it is -- it's just a way to  
3 create a forward picture of where these  
4 disparities exist and what factors do and  
5 do not explain them, but that really is  
6 -- the main reason is that moving up  
7 through occupational hierarchies in  
8 different industries often leads  
9 to -- business ownership is often the end  
10 stage of that.

11 So if there's -- if there's  
12 discrimination at lower levels that can  
13 suppress the emergence of business owners.

14 Q. And the disparities that you  
15 have identified with respect to salaries  
16 and wages in this part of your report, do  
17 you think they reflect any specific kind  
18 of discrimination?

19 A. No. I think they reflect an  
20 amalgam of all -- can -- you know, you  
21 remember in this first section we're  
22 looking at unadjusted disparities, but  
23 they can -- what we're looking at here is  
24 the end result.

25 They can -- they could reflect

1 discrimination in a variety of arenas, but  
2 particularly in the labor market.

3 Q. So when you say in the labor  
4 market, you mean by employers?

5 A. Well, not all discrimination is  
6 by individuals, but it could -- you've got  
7 job training programs, you've got  
8 government programs that affect the labor  
9 market, you've got specific employers,  
10 you've got customers. So yes but not  
11 exclusively employers.

12 Q. Okay. With respect to business  
13 formation, how do you control for an  
14 individual's desire to own a business, if  
15 you can?

16 A. I have no measurement of desire.

17 Q. You think that's an important  
18 omission?

19 A. If there were reason to believe  
20 that minorities and nonminorities were  
21 substantially different in being desirous  
22 to own businesses, possibly. I'm aware of  
23 no research to that effect, but it's not  
24 something I can measure.

25 Q. Okay. Is it fair to



1       assume -- let me start again.

2                       Is it fair to say that you  
3       assumed that the desire to own a business  
4       was consistent across the various races  
5       that you studied?

6           A.       I would put it -- that's close.  
7       I would put it somewhat different. I have  
8       no reason to assume they should differ in  
9       any -- you know, from individual to  
10      individual, yes, but should they differ by  
11      race, I have no reason or evidence to  
12      suggest that they should or do.

13          Q.       Do you think the disparities  
14      that you identified in business formation  
15      reflect any kind of specific  
16      discrimination?

17          A.       I'm not testing for specific  
18      kinds of discrimination. As an economist  
19      what I'm trying to do is look to see if  
20      there's quantitative differences in  
21      economic outcomes by race that aren't  
22      accounted for by differences in  
23      productivibility, such as endowments of  
24      human capital and financial capital.

25                       But which specific actors or

1 because it's your total earnings for the  
2 year. So to also control for weeks and  
3 hours would not be correct.

4 Q. I'm not sure I understand. So  
5 I'll ask the question in a different way.

6 If somebody is only working half  
7 time for their business, that might  
8 explain why they're only earning half as  
9 much money, right?

10 A. That would be reflected in their  
11 annual figure.

12 Q. Right. And so including it as  
13 an independent variable might help explain  
14 some of the variation in their annual  
15 figures, right?

16 A. I'd have to give that some more  
17 thought, but I think because it's already  
18 built into the annual earnings figure that  
19 it would be inappropriate to also control  
20 for weeks or hours but that's a question  
21 I'd have to give some more very specific  
22 thought to.

23 Q. I take it you didn't include  
24 that data point in your regression  
25 analysis; is that right?

1           A.       Hours and weeks were not a -- on  
2       the right-hand side of the equation,  
3       that's correct.

4           Q.       Okay. You also -- you used age  
5       as a substitute for experience; is that  
6       right?

7           A.       Yes. There's a proxy.

8           Q.       Well, isn't it the case that  
9       people of different ages can  
10      have -- excuse me -- people of the same  
11      age can have vastly different amounts of  
12      experience in a particular field?

13          A.       Sure. That's why it's a proxy  
14      and not -- there's no measure of actual  
15      experience. Just like a measure of desire  
16      to own a business, that I'm aware of, and  
17      certainly not in the PUMS data.

18          Q.       Okay. So there -- if I just go  
19      to the charts, you can look at any of the  
20      tables, it doesn't really matter, there's  
21      a lot of statistical significance here, a  
22      lot of numbers that have very high  
23      statistical significance.

24                   And my question is: Is that a  
25      reflection of the large numbers of

1 observations that would -- that you  
2 managed to collect for purposes of these  
3 tables?

4 A. In part, yes. It's a very large  
5 data set.

6 Q. In the PUMS analysis in all  
7 three categories that you examined, can  
8 you tell us who you think is doing the  
9 discriminating that causes the  
10 disparities?

11 MS. DINAN: Objection. Calls  
12 for speculation.

13 A. Oh, I was going to say asked and  
14 answered. I thought that's been asked  
15 before and I cannot.

16 Q. I asked with respect to specific  
17 parts and now I'm just trying to sort of  
18 wrap up here.

19 A. No. I can't and again if it's a  
20 culmination of overdiscrimination (sic) by  
21 individual actors or more institutional  
22 discrimination through social and economic  
23 mechanisms or all of the above may be the  
24 case, but I can't pinpoint that with this  
25 data.

1 done and I will turn the witness over  
2 to you, but I would like to take five  
3 minutes at this point to just review.

4 MS. DINAN: Yeah, I'd like to do  
5 the same if you're about to turn over  
6 to -- examination. So --

7 (Whereupon, a recess was  
8 taken.)

9 MR. ROSMAN: I just have a few  
10 more questions, Dr. Wainwright, and  
11 then I'm going to turn you over to  
12 Ms. Dinan.

13 Q. So in your PUMS analysis you  
14 excluded Hispanic whites from your white  
15 category; is that right?

16 A. The nonminority category is  
17 non-Hispanic. So yes, I think that's  
18 right.

19 Q. Okay. Why?

20 A. Primarily because Hispanic is  
21 one of the reference categories in the  
22 8(a) program --

23 Q. You were trying to establish  
24 whether there were distinctions  
25 between --

1           A.       I'm sorry. I wasn't quite  
2 finished.

3           Q.       Oh, I'm sorry.

4           A.       You can't have them in both  
5 categories.

6           Q.       Okay. But if you're trying to  
7 establish a difference in race, don't you  
8 want all the people of a given race in the  
9 race category?

10          A.       It's race and ethnicity and in  
11 almost all of these disparity studies and  
12 all the work I've ever done, they're  
13 fairly standard categories; African  
14 Americans, Hispanic, Asians, Native  
15 Americans, there might be some minor  
16 definitional differences between studies  
17 here and there, but those are the main  
18 categories, and those are the categories  
19 captured for preferences in the 8(a)  
20 program.

21                   So I tried to follow those  
22 definitions where the data would allow me  
23 to as we saw in the middle section of the  
24 report. For example, in the SBO Native  
25 Hawaiians are grouped in a different

CERTIFICATION

I, Garry J. Torres, a Notary Public  
for and within the State of New York, do  
hereby certify:

That, Dr. Jon Wainwright, the witness  
whose testimony as herein set forth, was  
duly sworn by me; and that the within  
transcript is a true record of the  
testimony given by said witness.

I further certify that I am not  
related to any of the parties to this  
action by blood or marriage, and that I am  
in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 17th day of March, 2022.



GARRY J. TORRES

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| 14 | Attorney Mr. Rosman from Center For Individual Rights has retained all exhibits. |                  |        |
| 15 |  |                  |        |
| 16 | INSERTIONS   |                  |        |
| 17 | Page   | Line             |        |
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| 19 | REQUESTS   |                  |        |
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1 ERRATA SHEET  
2 VERITEXT LEGAL SOLUTIONS

3 CASE NAME: ULTIMA SERVICES CORPORATION  
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6 WITNESS NAME: DR. JON WAINWRIGHT  
7 PAGE LINE(S) CHANGE REASON

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*See attached*

*Jon Wainwright*  
JON WAINWRIGHT

SUBSCRIBED AND SWORN TO  
BEFORE ME THIS \_\_\_\_\_ DAY  
OF \_\_\_\_\_, 2022.

NOTARY PUBLIC  
MY COMMISSION EXPIRES \_\_\_\_\_

Page 179

1 CERTIFICATION

2

3 I, Garry J. Torres, a Notary Public

4 for and within the State of New York, do

5 hereby certify:

6 That, Dr. Jon Wainwright, the witness

7 whose testimony as herein set forth, was

8 duly sworn by me; and that the within

9 transcript is a true record of the

10 testimony given by said witness.

11 I further certify that I am not

12 related to any of the parties to this

13 action by blood or marriage, and that I am

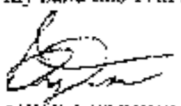
14 in no way interested in the outcome of

15 this matter.

16 IN WITNESS WHEREOF, I have hereunto

17 set my hand this 17th day of March, 2022.

18

19 

20 GARRY J. TORRES

21

22

23

24

25

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## ERRATA

p12

line 2 midwest fence should be Midwest Fence

line 3 disadvantaged business enterprise should be Disadvantaged Business Enterprise

line 15 Rothy should be Roth throughout

line 23 Rothy Two should be Rothe II

p13

line 10 DV should be DC

p14

lines 22-23 Cossman should be Kossman

p23

line 5 defendant's expert should be defendant's expert report

p27

lines 21-22 Econ Salt should be Econsult

p34

line 18 alluded should be eluded

p42

line 4 subanalysis should be subanalyses

line 14 MBB should be MBE

p43

line 8 the total should be that total

line 14 MBA should be MBE

p60

line 50 procontractor should be prime contractor

p64

line 60 Prince George should be Prince George's

line 25 interest or should should be interest should

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line 9 consensus should be custom census

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line 24 minority should be minorities

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line 2 consultants should be consultants'

line 19 could should be could have

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line 8 DOJ should be did DOJ

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line 14 ADS should be ABS

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line 10 business should be census

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line 7 clients should be client's

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line 1 American community survey should be American Community Survey

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Lowery should be Lowrey throughout

p149  
Fairley should be Fairlie throughout

p153  
line 3 interest in dividence should be interest and dividend

p157  
lines 17-18 bureau of labor statistics should be Bureau of Labor Statistics  
lines 21-23 bureau of labor statistics should be Bureau of Labor Statistics,  
bureau of economic analysis should be Bureau of Economic Analysis, census bureau should be Census Bureau

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line 5 census bureau should be Census Bureau

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line 7 ethic should be ethnic

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line 11 union that should be union or

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line 10 it's should be it  
line 19 factor could should be factor that could